BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES BURNS	)	
Claimant	)	
VS.	)	
	)	Docket No. 234,541
SNORKEL INTERNATIONAL, INC.	)	
Respondent	)	
AND	)	
	)	
RELIANCE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the May 23, 2002 Award of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits after the Administrative Law Judge ruled that claimant had failed to provide timely notice of accident and had further failed to submit timely written claim. The Appeals Board (Board) held oral argument on January 7, 2003.

APPEARANCES

Claimant appeared by his attorney, James R. Shetlar of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew S. Weaver of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, respondent stipulated that the issues regarding whether claimant suffered accidental injury and whether his accidental injury arose out of and in the course of his employment were no longer in dispute. The Board, therefore, finds those issues in favor of claimant.

ISSUES

(1) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520 (Furse 1993)?

(2) Did claimant submit timely written claim pursuant to K.S.A. 44-520a (Furse 1993)?

(3) What is the nature and extent of claimant's injury and/or disability?

(4) Was there a settlement agreement entered into in this matter between the parties and, if so, is respondent equitably estopped from denying said settlement?

(5) Pursuant to Claimant's Motion To Set Aside Award, should the Administrative Law Judge's Award be set aside?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that claimant should be denied benefits in this matter for having failed to submit timely written claim pursuant to K.S.A. 44-520a (Furse 1993).

Claimant, a long-term employee of respondent, began experiencing back difficulties while performing his job duties for respondent in July 1996. This problem worsened for approximately a month. Claimant advised his supervisors in July or August 1996 about the pain. Claimant testified that he did tell the supervisors that it was work related, although the evidence from claimant's testimony is somewhat contradictory as to exactly what he may or may not have told his supervisors at the time of the injury. However, during claimant's deposition, he did testify that he advised his supervisors his back had started hurting while he was doing his job.

Claimant was referred for medical care which was paid for by his private health care provider, ultimately coming under the care and treatment of neurosurgeon Patricio H. Mujica, M.D. Claimant was, at first, treated conservatively. However, Dr. Mujica, after ordering an MRI, determined that claimant needed surgery. Claimant underwent a laminectomy discectomy on October 15, 1996, with Dr. Mujica. Claimant was off work for approximately 12 weeks, returning to work with respondent on January 14, 1997. Claimant worked for respondent in an accommodated position until September 21, 1998, when he was terminated due to attendance problems. Claimant collected unemployment for a period of time and ultimately obtained a job working a picket line through November and

December 1999. He was paid $75 a day for this activity. In January 2000, he went to work for the Missouri Department of Corrections as a maintenance worker and then as a boiler operator. At the time of the regular hearing, he was making $920 twice a month. This computes to an average weekly wage of $424.62, which, when compared to his average weekly wage of $848.49, equates to a 50 percent loss of wages.

The first time written claim was submitted to respondent requesting workers' compensation benefits was on June 26, 1998. Claimant testified that in 1997, he hired an attorney to submit written claim for him, but no documentation is contained in the file to support his contentions.

Claimant was examined by Pamela S. Harris, M.D., board certified in physical medicine and rehabilitation, on November 30, 1999, at claimant's attorney's request. Dr. Harris found claimant to have suffered a 10 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), due to the deficits secondary to the L5-S1 disc herniation. Dr. Harris placed restrictions upon claimant, limiting him to no more than light to medium work.

Dr. Harris was provided a copy of vocational expert Michael Dreiling's task analysis. After reviewing that analysis, Dr. Harris determined claimant was incapable of performing eight of the ten tasks, for an 80 percent task loss. She was also provided the task analysis report of vocational expert Mary Titterington. After reviewing the tasks of Ms. Titterington, she determined claimant incapable of performing between 43 and 48 percent of the tasks. The lack of specificity was due to the fact that some tasks did not identify weights.

This matter was set for regular hearing on several occasions, the first being May 10, 2001. It was then moved to September 6, 2001, after a scheduling difficulty. Just before the September 6 regular hearing, the parties agreed to a tentative settlement of $20,000, with the settlement being scheduled for October 11, 2001, in Overland Park, Kansas. That settlement did not occur as a result of claimant's change of heart. A second settlement was reached and another settlement hearing was scheduled, but that hearing was cancelled by claimant's attorney, and then rescheduled for February 14, 2002. That hearing was also cancelled. The matter was set for regular hearing on April 11, 2002.

As is the case with Judge Benedict, claimant's terminal date was the date of regular hearing, April 11, 2002. That matter went to regular hearing, claimant's terminal date expired and claimant submitted a submission brief on April 16, 2002, with no request for an extension of claimant's terminal date.

Shortly after the regular hearing, the attorneys again reached a settlement. However, the Administrative Law Judge was not advised of the tentative settlement and, on May 23, 2002, the court issued its award, denying claimant benefits.

Claimant contends that as a result of a settlement agreement negotiated between the parties, respondent should be equitably estopped from refusing to settle this matter and the award should be set aside.

Claimant also contends the award should be set aside because the matter had been previously settled between the parties. Respondent contends based upon *Barncord*,[1] the settlement is not enforceable unless and until it is properly approved in accordance with the statutory provisions.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

K.S.A. 44-520 (Furse 1993) requires notice of accident be given to the employer within 10 days of the date of the accident.

In this instance, claimant testified that he talked to his employer, advising that his back had started hurting while he was doing his job. This testimony is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy.[3] The Board finds that claimant did provide notice of accident to respondent within 10 days of the accident. Therefore, the Award of the Administrative Law Judge on this issue is reversed.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[4]

The record indicates claimant's written claim was not submitted until June 26, 1998. Claimant was returned to work by Dr. Mujica on January 14, 1997. This is clearly beyond 200 days from the date of accident.

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[1] *Barncord v. Kansas Dept. of Transportation*, 4 Kan. App. 2d 368, 606 P.2d 501, *aff'd* 228 Kan. 289, 613 P.2d 670 (1980).

[2] K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

[3] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[4] K.S.A. 44-520a (Furse 1993).

K.S.A. 44-557(a) (Furse 1993) states in part:

> It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

K.S.A. 44-557(c) (Furse 1993) states that failure of the respondent to submit the report of accident extends the written claim time to "one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee . . . ."

In this instance, there is no indication that respondent submitted an accident report. Therefore, under K.S.A. 44-557 (Furse 1993), the written claim time would be extended to one year. However, the June 26, 1998 written claim date even exceeds the one-year limitation of K.S.A. 44-557 (Furse 1993). The Board, therefore, finds, pursuant to K.S.A. 44-520a (Furse 1993), claimant has failed to submit timely written claim and benefits requested by claimant should be denied. The Award of the Administrative Law Judge in this regard is affirmed.

Claimant requests the Board consider his Motion To Set Aside Award, alleging equitable estoppel should apply to the settlement agreement which had been reached between the parties prior to the May 23, 2002 Award.

The Board acknowledges that the doctrine of equitable estoppel is applicable to workers' compensation proceedings.[5]

However, to rely on such theory, it must be established that claimant was, by the acts, representations, admissions, or silence of the respondent when it had a duty to speak, induced to believe certain facts existed. Claimant must also show that he or she rightfully relied upon and acted upon such beliefs and would now be prejudiced if the other party were permitted to deny the existence of such facts.[6]

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[5] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[6] Id.

In this instance, the matter was set for regular hearing and settlement hearing on several occasions. It went to regular hearing on April 11, 2002, with no settlement agreement reached. Claimant's terminal date ran, and the matter was submitted for decision by the time the settlement was reached. There is no evidence in the record that claimant was, in some way, misled by any acts, representations, admissions or silence of the respondent. There is further no indication that claimant relied upon any such acts to his detriment. The Board finds that equitable estoppel does not apply in this instance.

Claimant further requests that the award be set aside because a settlement agreement had been reached. Kansas law is clear that no settlement is final or binding until disposed of either by filing a settlement agreement, a final receipt and release of liability, hearing and written award, joint petition and stipulation or a settlement hearing before the Administrative Law Judge.[7] Additionally, the Kansas Court of Appeals, in *Barncord,*[8] noted that K.S.A. 44-521 (Furse 1993) allows settlements by agreement subject to the provisions of K.S.A. 44-527 (Furse 1993). That statute requires the filing, recording and approval of all such agreements. In this instance, no such settlement agreement had been memorialized under any of the above methods allowable by statute. The fact that the Administrative Law Judge was not notified of this settlement is regrettable, but is not fatal to the validity of the Award.

The Board, therefore, finds Claimant's Motion To Set Aside Award should be denied.

The Administrative Law Judge made additional findings and conclusions regarding the nature and extent of claimant's injury, claimant's average weekly wage, claimant's entitlement to temporary total disability compensation and a determination regarding claimant's entitlement to a work disability. The Board affirms those findings insofar as they do not conflict with the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 23, 2002, denying claimant additional benefits for having failed to provide timely written claim of accident pursuant to K.S.A. 44-520a (Furse 1993), should be, and is hereby, affirmed.

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[7] K.A.R. 51-3-1; K.A.R. 51-3-16; K.S.A. 44-527 (Furse 1993) and K.S.A. 1996 Supp. 44-531(a).

[8] *Barncord, supra*.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Matthew S. Weaver, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation